No. 84-1258

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

— v. —

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

21 RESPONDENTS' BRIEF OPPOSING CERTIORARI

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FRAYN PRINTING, SEATTLE, WASHINGTON

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The 21 Respondents[1] (among the 88 respondents in this case) submit this brief to support their respectful request to this Court to deny certiorari.

The decision and record of this case neither (a) support the facts postulated in the Questions Presented by the Petition[2] nor (b) present the constitutional issues (of Takings and Due Process) that Petitioners assert.

We adopt the statement of Questions Presented by the Nine Respondents.

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1. *Oregon Cities:* City of Bandon. *Montana Cooperatives:* Glacier Electric Cooperative. *Nevada Cooperatives:* Wells Rural Electric Co. *Washington Cities:* City of Port Angeles, Centralia Electric Light, McCleary Light and Power. *Washington Cooperatives:* Elmhurst Mutual Power & Light Co., Ohop Mutal Light Company, Okanogan County Electric Cooperative, Inc., Parkland Light & Water Co. *Idaho Cities:* Cities of Bonners Ferry, Burley, Heyburn, Idaho Falls and Rupert. *Idaho Cooperatives:* Clearwater Power Co., Idaho County Light & Power Cooperative Assn., Inc., Northern Lights, Inc., Prairie Power Cooperative, Inc., Rural Electric Co. and Unity Light & Power Co. Of these 21, three (the Washington cities) were subject of the decision in *Chemical Bank v. WPPSS ("Chemical Bank I")*, 99 Wn. 2d 722, 666 P. 2d 329 (1983), and all were subject of the trial court judgment dated August 11, 1983 affirmed by *Chemical Bank v. WPPSS ("Chemical Bank II")*, 102 Wn. 2d 874, 691 P.2d 524 (1984).

2. Some of the facts that the Petition asserts contain no support in the record. Some of the factual assertions are simply false. Of those, none is a fact of which judicial notice may be taken. The Petition undertakes to support some of these assertions by presenting items of information from outside the record (Attachments A & B and Note 4, p. 8). Other assertions are unsupported even by items beyond the record. Petitioners have asserted as "facts" in their petition many of the issues which they are currently litigating in *Chemical Bank III (Chemical Bank v. Public Utility Dist. No. 1 of Benton County, et al.*, C83-1080); *Washington Public Power Supply System Securities Litigation*, MDL No. 551, USDC; *M.G.I.C. Indemnity Corp. v. Public Utility Dist. No. 1 of Benton County, et al.*, C84-690, USDC; and *Frederic Haberman, et al. v. Chemical Bank and WPPSS, et. al.*, 84-2-06452-8, Superior Court of Washington. In these securities cases, the issues currently involved in intense discovery for resolution at trial include many of the "facts" Petitioners raise here—representations of Participants, approval of official statements by Participants, supervision of the projects, basis for the sale of bonds (Petit. 3); WPPSS as an instrumentality of the Participants (Petit. 4), marketing of the bonds (Petit. 6), reliance by Bondholders (Petit. 6, 16, 21), security for the bonds (Petit. 6, 16). None of these "facts" is in the record in this case. Nor are they "facts"; they are issues being litigated in the many suits pending in federal and state court on behalf of Bondholders.

I. STATEMENT OF THE CASE

A. Parties.

Petitioner Washington Public Power Supply System ("WPPSS") was created in 1957, pursuant to Washington statute. Although during the period in question it did not lack income or "lack substantial assets of its own" (contrary to Bondholders' assertion (Petit. 4)), WPPSS did lack unencumbered assets and income, and it did lack equity. It could only acquire additional assets by borrowing.

Petitioner Chemical Bank (hereafter "Bondholders") is the trustee under WPPSS' Bond Resolution for all holders of bonds issued by WPPSS for its nuclear plant Projects No. 4 & 5. The Petition asserts that the WPPSS No. 4 & 5 bonds are held by people who are especially in need of protection by the law, the Constitution and the courts.[3] The record, however, tells nothing about who owns these bonds, as most of them are unregistered and all are bearer bonds (Petit. 8, n.5).

The Petition concludes with a plea to resist "pressures to protect the public against unwise decisions taken in its name — at the expense of politically powerless minorities" (Petit. 28).[4] As to this, it may be observed that the individual owners of tax-exempt bonds undoubtedly are a minority in American society and, of course, they have constitutional rights. But the record does not show that these bondholders' financial station differs from that of most of those people whose level of taxable income induces purchase of tax-exempt securities.

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3. For example, the Petition claims that many of the Bondholders had invested their life savings in the bonds (Petit. 28); "frequently for the retirement income they were expected to provide" (Petit. 9).

4. The petition does not disclose that in addition to the individual holders of bonds, it is probable that the majority of bonds were purchased by large institutional investors with sophisticated research staffs, rather than individuals. For example, it is a matter of public record that the Bondholders which have filed suit in *Haberman v. WPPSS (Frederic Haberman, et al. v. Chemical Bank and WPPSS, et al.*, 84-2-06452-8), total approximately $340 million, most of which is held by U.S. Trust Company Bank, American Express, and its affiliates.

Respondents (hereafter "Participants") are local electrical utilities:

43	Rural electrical cooperatives among six northwest states
23	Public utility districts in Washington and Oregon
21	Cities and towns in Washington, Oregon and Idaho
1	Irrigation district in Washington
88	Total Participants

All distribute electricity to consumers. Except for some of the larger communities, which have hydroelectric dams, none produces more than a negligible quantity of electricity itself, and most produce none.[5]

B. Events.

1. *Participants' Agreement.*

WPPSS prepared a contract ("Participants' Agreement") and submitted it to each of the Participants. In July, 1976, representatives of WPPSS and each Participant signed this instrument.[6]

All 88 copies contained identical language and terms. Each had 63 pages, plus exhibits. The only blanks were for a Participant's name and share and the date of execution. Each Agreement was made subject to the 117-page WPPSS Board of Directors Resolution No. 890 (the "Bond Resolution").[7] The Bond Resolution, in turn, constituted a contract between WPPSS and the bondholders.[8]

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5. During this proceeding, McCleary, Washington, not the smallest of the 88, had 708 user/ratepayers (21 Petitioner's Br. 50); Okanogan had 3 employees and fewer than 1,500 customers (CP 1241); Idaho County Light had 1,700 members (CP 1243).

6. *Chemical Bank II*, at p. 881.

7. Agreement § 25, p. 60

8. Bond Resolution § 14.1; CS 128, Attachment; CP 6605 - record in Washington Supreme Court.

Each Participant completed and signed, in response to instructions, a form resolution, a form resolution certificate, a form certificate of counsel and a form attorney's escrow letter.[9]

By the terms of the Participants' Agreement and the related Bond Resolution, WPPSS was to borrow money by issuing tax-exempt *revenue* bonds. With the borrowed proceeds, WPPSS was to build two plants (WNP No. 4 & 5) that would use nuclear energy to generate electricity. These projects were to be self-liquidating. They would produce electricity that WPPSS would sell to the Participants, which essentially would serve as WPPSS' distribution network. The revenues that WPPSS would derive from the sale of electricity from WNP No. 4 & 5 would be used to pay the interest and principal on those bonds that it issued in connection with those Plants.

By the terms of the Participants' Agreement, each Participant agreed to buy from WPPSS a specified share of the electrical output to be produced by WPPSS from the two plants. It was in essence a supplier contract.

Disputed in this case was the interpretation of this Agreement: whether or not it constituted an unconditional commitment by each Participant to pay WPPSS even if WPPSS never delivered to that Participant the supply of electricity that it had sought to buy. The Washington Supreme Court did not rule on this question, basing its decisions on other grounds.[10]

2. *WPPSS Sold the Bonds and Spent the Proceeds.*

Pursuant to this undertaking, WPPSS borrowed over $2 billion by issuing *revenue* bonds for that amount.[11]

The legal counsel that WPPSS retained (Wood & Dawson as bond counsel in New York, plus a Seattle firm as special coun-

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9. CS 474, Ex. 10; CP 2459.

10. *Chemical Bank I*, at p. 781, n.1. The Superior Court ruled that section 6(d) of the Agreement (Petit. App. B-5) constitutes such an unconditional obligation. For purposes of this brief opposing certiorari, we assume the Superior Court interpretation to be correct.

11. The record contains no support for the Petition's statement that WPPSS "issued the bonds at the direction, and for the benefit, of 88" Participants (Petit. 3).

sel) issued their opinion in the Official Statement for each bond issue. The opinion declared that at least 72 of the Participants had legal authority to enter the Participants' Agreement. The Participants themselves did not retain bond counsel. However, the local counsel of each of the 88 Participants signed and returned to WPPSS the "form certificate of counsel" submitted to each Participant by WPPSS.[12]

The bond proceeds all went to WPPSS, the borrower, and all were spent "for its purposes"[13] by WPPSS, which over the years had grown to a size that gave it a momentum and purpose of its own. WPPSS spent some of this money on the two construction projects, paid some to underwriters[14] and spent some on administration. (In November 1980, WPPSS employed more than 2,000 people, of whom more than 1,000 were "in executive, finance and administrative functions."[15]) WPPSS devoted the rest to pay interest on its earlier borrowings (Petit. App. B-31).

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12. From these facts, the Petition derives its repeated assertions that the Bondholders (or their predecessors) had bought in reliance on representations by Participants (Petit. 6, 16, 21). Some amicus briefs support the Petition by characterizing these facts as "inducement leading to the creation of an investment-backed expectation" (PSA Amicus B. 91-10). It should be noted that (1) local counsel letters do not appear in any official statement; (2) the only reference to them is in the opinion letters of bond counsel and special counsel which do appear on the official statements; and (3) the bond counsel and the special counsel opinion letters indicate that they relied on local counsel letters *only* for procedural matters involved in the execution of the Agreement (i.e., signature, quorum of approving meeting, etc.) and not for substantive authority which was the subject of the Washington Supreme Court decisions.

13. *Chemical Bank II*, 102 Wn. 2d at 911. The Participants no more directed the spending of this money than they had directed its borrowing. The record contains no support for Petitioners' claims that "The participants then supervised the irretrievable expenditure of the bondholders' funds" (Petit. 3) and Participants "overseeing the expenditure of that vast sum" (Petit. 14).

14. The underwriters that have filed a motion for leave to submit an amicus brief are the same underwriters which participated in every WPPSS bond offering for WNP 4 and 5 and for WNP 1-3. Their underwriting fees, expenses, and profits total in the millions of dollars. Their profits from trading these same WPPSS bonds in the secondary market are even higher. It is incredible that these underwriters now claim that Participants, rather than WPPSS, received a "benefit" from the sale of WPPSS bonds. The Participants received not one dollar; the underwriters millions.

15. Washington State Senate WPPSS Inquiry, Vol. I, p. 8 (CS 1081; CP 3).

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The Petition inaccurately asserts that the bond proceeds went to the Participants: "For five years the Participants had the use of the Bondholders' money" (Petit. 20); "appropriation of the Bondholders' property" (Petit. 11); "expressly promising that they would repay the loan" (Petit. i); "denying any obligation to return any portion of the Bondholders' funds" (Petit. 4); "refused to return any portion of the Bondholders' funds" (Petit. i and 8).[16]

However, not a dollar reached the Participants. They were not the borrowers, and not the recipients of the borrowed money, but rather the alleged obligors (under an unenforceable contract) of WPPSS' own debt. *Chemical Bank II*, at 907. The Participants not only received no money, they also received none of the electricity for which they had bargained.

In 1982, announcing that its credit had run out, WPPSS abandoned the two projects, one-fifth complete.[17] No income could be derived from the generating plants that were to earn the revenue to pay off these revenue bonds. WPPSS' only income and assets other than the unfinished projects were apparently subject to prior encumbrances.

3. *Action for Declaratory Judgment.*

In light of WPPSS' prospective inability to pay when its debts came due, the Bondholders' Trustee, Petitioner Chemical Bank,

16. Likewise, all five of the amicus briefs that have been offered in support of the Petition have asserted that the Bondholders' money went to the Participants, which then refused to pay it back: "the participants' retention of over two billion dollars" (PSA Amicus Br. 9); "refusing to return the bondholders' funds" (AARP Amicus Br. 7).

17. *Chemical Bank I*, at 776; Bond Resolution 1203. The record contains no support for the Petition's claim (Petit. 7) that the Participants refused to allow WPPSS to borrow more money, or to continue the projects, and that such refusal caused abandonment.

brought this action. It sought a declaratory judgment that the Participants owed WPPSS enough money to enable WPPSS to pay the debts that it had incurred to the Bondholders. In substance, the Bondholders asserted the position of third-party beneficiaries of the contracts (Participants' Agreement) between WPPSS and the Participants.

The Participants defended against this action, asserting several defenses. Among them were defenses that the Washington municipalities lacked statutory authority to enter the Participants' Agreement and that, as to them, this Agreement violated the State Constitutional debt limit.[18]

The Washington Supreme Court, in *Chemical Bank I*, ruled that the unconditional payment commitment of the Participants' Agreement was unenforceable as to Participants that were Washington municipalities. Thereafter, in *Chemical Bank II*, the trial court on August 11, 1983, resting its summary judgment on all undisputed facts before it,[19] rejected the Bondholders' equitable claims (unjust enrichment, etc.) against all Participants (Petit. App. D). Then WPPSS' next debt payment came due on the bonds. At that time, as the trial court declared, WPPSS "insofar as Projects 4 and 5 is concerned, is now insolvent" (Petit. App. C-7). Also, some of the Participants raised their rates and put the payments into a court-approved escrow pending the outcome of this litigation and some of them paid directly to WPPSS.[20] Unable to pay, WPPSS did not pay, and Chemical Bank declared a default.

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18. A partial basis for the ruling. Concurring opinion by Dore, J., *Chemical Bank I*, at 801-04.

19. The Petition attempts to create the impression that the Bondholders had no opportunity to submit facts before this summary judgment hearing. That impression is false. *See* discussion at p. 13, *infra*.

20. Characterized by proponents of certiorari as, "participants willfully destroyed the security for the bonds" (PSA Amicus Br. 10).

The August 11, 1983 judgment was affirmed by the Washington Supreme Court in *Chemical Bank II*.[21] The Petition to this Court followed.

Although WPPSS has defaulted, it has not repudiated its debts. It continues to owe the full amount of its debts to the Bondholders and it continues to operate, but apparently those of its assets not encumbered by other creditors are insufficient to pay the bonds in full. WPPSS joins as a Petitioner here, presumably toward the end of restoring its lost credit standing and borrowing capacity.

II. REASONS FOR DENYING THE WRIT

A. Petitioner WPPSS — The U.S. Constitution Does Not Protect a State From Itself.

Petitioner WPPSS, a Washington municipal corporation, fails to raise a Federal question by its claim that it has been denied rights under the 14th Amendment by a court of the State that created it. *Williams v. Baltimore*, 289 U.S. 36, 40 (1933). The Bill of Rights protects people from government, not one branch of a state from another.

B. Petitioner Chemical Bank (Bondholders) — A State Court's Erroneous Interpretation of State Law Violates Neither Due Process Nor The Takings Clause.

The Bondholders do not raise a federal question by pursuing a contract claim against municipal corporations. *Manila Investment Co. v. Trammell*, 239 U.S. 31, 32 (1915). The Bondholders declare that "this case raises serious questions about municipal financing, public morality and trust in government" (Petit. 28). Maybe. But are those federal questions?

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21. In explaining why the doctrine of *ultra vires* had been retained for governmental entities, while it had been discarded for private corporations, the Washington Court declared that:

> Unlike a corporate shareholder, who may choose the corporate bodies in which she invests and withdraw her investment at will, a citizen and taxpayer has only one government in which to "invest" and may not withdraw except by death or expatriation.

Noel v. Cole, 98 Wn.2d 375, 379, 655 P.2d 245 (1982).

In *Chemical Bank I*, the Washington Supreme Court decided a question of state law: whether the Washington municipal Participants were contractually obligated to commit themselves under the Participants' Agreement. In interpreting similar contracts concerning other WPPSS projects, the Ninth Circuit held that state law, not federal law, was applicable even where the United States was a party to the contracts.[22]

Then in *Chemical Bank II*, the Washington Court upheld the summary judgment on the Petitioner Bank's equitable claims as to *all* Participants. This too concerned questions only of state law.

The Petitioners dispute the Washington Supreme Court on many of its rulings, including those on *ultra vires*, mutual mistake, restitution, equitable estoppel and frustration of purpose (Petit. 19-26). Authors of several legal articles have also criticized the Washington Supreme Court for both its holdings and its opinions in this case (Petit. 12, n.6), as have several amicus briefs.[23] The dissenting opinions on the Court itself have done the same. Even if *Chemical Bank I & II* were mistaken, and even if these opinions, interpreting Washington statutes and aspects of the common law of contracts, expressed unsound analyses of contractual relationships and displayed an incorrect application of precedent, without more, such an error by a state court interpreting state law does not deny due process. *Engle v.*

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22. *City of Springfield v. WPPSS*, Nos. 83-3927, 85-4054 (9th Cir. Feb. 4, 1985). The Ninth Circuit applied state law in determining the authority of a group of public utilities (among which are many of the 88 respondents/Participants in the case at bench) to enter a three-party contract with WPPSS and the Bonneville Power Administration for WPPSS' Nuclear Generating Projects Nos. 1, 2 and 3. The Ninth Circuit decision held that state law should be applied to interpret the contracts, not federal law as the Oregon District Court had held.

23. *Chemical Bank II*, at 894 and 905. The amicus briefs do not raise any additional substantive arguments not raised by Chemical Bank. They do suffer from the same defects of (1) attempting to inject sympathy on the basis of matters outside the record, and (2) obvious misstatements of the record.

Isaac, 456 U.S. 107, 121 (1982). The Washington Court's errors — if it erred — in determining contract claims against cooperatives and municipal corporations raised no Federal question.[24]

C. Alleged Denial of Procedural Due Process.

1. *State Justices' Failure to Recuse Themselves.*

The Petition complains that, "The Court below, composed of elected Justices, failed even to address the question whether any of its members should be disqualified from hearing the appeal" (Petit. 27). For a United States court to overturn a state court decision on the basis of the state judge's parochial bias or subjection to constituents calls for substantial proof.[25]

Not until *after* the Washington Supreme Court had ruled against the Bondholders in *Chemical Bank I* did their Trustee (which had chosen to bring this action in state court) request that members of that Court should disqualify themselves for living in "communities served by respondents" (Petit. 27, n.22).

In *Chemical Bank II*, the Court ruled against WPPSS and the Bondholders by a 6 to 3 vote. Yet according to the Petition, only one member of the *Chemical Bank II* majority resided in a community served by one of the respondent/Participants (Petit. 27, n.22). This member was the late Justice Rosellini, who died November 26, 1984, three weeks after filing the Court's opinion, which he had written.

Judges customarily rule on the validity of statutes that impose taxes to which the judges are subject, since their "financial stake

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24. "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . (or) immunity from judicial error . . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 554-55 (1962) (citation omitted).

25. Aside from charges of motives, not even the effect of these decisions was clearly a "home town decision" in view of the fact that (1) some Bondholders live in Washington, (2) some customers of Participants live outside Washington, and (3) ruling against the Bondholders exposed the population of Washington to the pending claim against the State for the full burden of the debt (*Chemical Bank II*, dissent, at p. 914).

in the outcome of the litigation" (Petit. n.22) is considered too small to create an interest in the outcome. The Petition has noted that if the Participants were held obligated to WPPSS and thereby to the Bondholders, a customer of a Participant would sustain increased electricity charges of .5 cents per kwh (Petit. 8, n.4). Is this prospective addition to one's light bill a "substantial pecuniary interest"[26] that disqualifies a judge?

2. *Claim That "The Bondholders Had No Notice Or Opportunity To Protect Their Rights."*

In ruling on issues of mutual mistake and equitable estoppel, the Washington Supreme Court observed that the Participants' Agreement could have been subjected to "judicial determination of the authority question" (*Chemical Bank II*, at 988 and 905) before the bonds had been issued.

In response to this, the Petition asserts (Petit. 18-19 and 26-27) that the Bondholders had no notice of such opportunity and, furthermore, that opportunity was denied them because Washington law did not provide for it. The Petition concludes that such a "retroactive invocation . . . of an unavailable remedy" (Petit. 27) denied them procedural due process.

But a remedial opportunity *was* available.[27] Such test cases, determining the prospective validity of municipal bond issues, are often undertaken because occasional adverse adjudications[28] may suggest that failure to test increases investors' risk.[29]

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26. "(T)hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

27. RCW (Revised Code of Washington) 7.25.010. *"Validity of bond issues may be tested.* Whenever the legislative or governing body of any county, city, school district or other municipal corporation or taxing district, shall desire to issue bonds and shall have passed an ordinance or resolution authorizing the same, the validity of such proposed bond issue may be tested and determined in the manner provided in this chapter."

28. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 329 (1958), *Pierce County v. Taxpayers Lakes Dist.*, 70 Wn.2d 375, 423 P.2d 67 (1967), *Port of Longview v. Taxpayers*, 85 Wn.2d 216, 533 P.2d 128 (1974).

29. The promised return of 14% on some of these bonds may have suggested to investors that they faced a comparatively high risk.

Of course, the Bondholders themselves could not have brought a test case as to bonds that they had not yet bought. However, Chemical Bank could have requested that WPPSS, as the issuer-borrower, undertake such a prudential measure before the Bank consented to become the Trustee for the Bondholders under the Bond Resolution, which was adopted in advance of the bonds' issuance.

In addition, the Bondholders' Trustee could have avoided in another way the risk presented by any Participants' uncertain contractual authority. As has been successfully done in other jurisdictions,[30] Petitioner Bank could have sought statutory authorization for such an unconditional obligation by a municipal corporation.

Because (a) the Trustee had notice of the availability of this protective measure by reason of the Trustee's presumed knowledge of the law in the jurisdiction where the bonds were to be issued, and because (b) by Washington law "private parties dealing with a government agency are charged with knowledge of the agency's authority,"[31] the Washington Court did not deny due process when, in dictum, it discussed this failure to test the Participants' authority.

3. *Claim That The Washington Court Decided Critical Factual Issues Without Allowing Bondholders A Chance To Be Heard.*

The Washington Court held that those Participants that are Washington municipal corporations had lacked statutory authority to commit themselves, on behalf of their citizen ratepayers, to an unconditional obligation to pay for constructing the plants. On the basis of prior Washington cases, and after analysis of every conceivable statutory underpinning, the Court

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30. North Carolina, Gen. Stat. § 6-23.110 (language almost identical to that of Participants' Agreement § 6(d); Virginia Code, § 15.1-1611; Massachusetts, Gen. Laws Ann., Ch. 13, § 5(1) and § 6; Maine Rev. Stat. Tit. 35, § 4103 (1) (B); Vermont, Stat. Ann. Tit. 30, § 604 (2) and § 5013(a).

31. *Noel v. Cole, supra*, note 15, 98 Wn.2d at 379; and this includes purchasers of municipal bonds. *State of Washington v. Maricopa County*, 152 F.2d 556, 561 (9th Cir. 1945), *cert. denied* 327 U.S. 799 (1946).

further held, however, that these municipal corporations nonetheless would have authority to bind themselves by such a commitment only if they either owned the project or possessed sufficient control under the Agreement to be the equivalent of ownership.[32]

No one claimed that the Participants owned WPPSS. There remained the question whether they had enough "control to constitute the equivalent of an ownership interest" (*Chemical Bank I* at 787). To answer that question, the Court examined the Participants' Agreement which embodied the contractual relationship between WPPSS and the 88 Participants. The Court concluded that, as a matter of law, the contract provided insufficient control to be the equivalent of ownership. This was a legal decision, not requiring a factual conclusion.

The Washington Court also rejected the Bondholders' theory of equitable estoppel as a basis for enforcing that contract claim (*Chemical Bank II*, at 905). As to this, Petitioners claim that on remand after *Chemical Bank I*, the trial court "without hearing any evidence" (Petit. 11) entered summary judgment dismissing Petitioners' various additional theories of recovery, including equitable estoppel. However, the summary judgment motion, like all such motions, was decided on the basis of all uncontested evidence that the parties submitted. Respondent/Participants submitted evidence in the form of affidavits (*Chemical Bank II* at 2178-79, 2181, 2183-87, 2189-2196, 2198). If the trial court ruled without evidence of Petitioners, it was only because Petitioners failed to submit any. Petitioners did not claim that they needed additional time to obtain evidence as they could have done pursuant to the state counterpart of F.R.C.P., Rule 56(f). Because they chose to litigate on the basis of legal issues and the factual record made by the moving parties, they cannot claim that the Washington Supreme Court denied them due process by affirming the trial court's ruling on the factual record made by both respondent/Participants *and* Petitioners.

The Bondholders claim (Petit. 23-26) that they were denied procedural due process by the Washington Court's failures to require evidentiary hearings on these two issues (equitable estoppel and control). However:

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32. *Chemical Bank I*, at 787; reaffirmed by *Chemical Bank II*, at 893.

(a) Because the Washington Supreme Court ruled these to be questions not of fact but of law,[33] evidence was not needed. The Supreme Court's reference to facts to demonstrate that its legal interpretation of the contract is correct does not render its legal decision defective.

(b) Although this case was not tried, it went through two trial court judgments, each reviewed on appeal. In the trial court proceedings, the Bondholders offered no evidence, by affidavit or otherwise, on these issues. The record before the Washington Supreme Court when it decided *Chemical Bank II* comprised a total of 2,612 file items, which were composed of about 17,000 pages. This ruling was not an instance of a court striking a complaint in excessive reliance on judicial notice.

D. Alleged Unconstitutional Taking.

1. *Participant Municipal Corporations' Failure to Pay WPPSS' Contract Claim.*

The Takings Clause has not been interpreted to mean that a governmental unit, by declining to pay a contract claim that may be legally unenforceable, is thereby committing "state action" that constitutes a "constitutional taking."

The Takings Clause has been used to make an injured party whole where regulation by government has imposed such a heavy economic burden on one party or class of parties that fairness calls for shifting this burden to the general public. The case before this Court does not concern regulation that may have gone so far as to call for some rectifying compensation. None of the Participant electrical utilities undertook to regulate bondholders.

Petitioners argue that Respondents interfered with the bondholders' reasonable investment-backed expectations. Here, even if the Bondholders' investments were accompanied by such expectations, such "interference" amounting to a constitutional taking was not committed by a municipal electrical

33. *Chemical Bank II*, at 894 and 9805.

utility when it failed to fulfill a contract that a court had adjudicated to be void.

2. *Washington Court's Decisions That Contract Claim Was Unenforceable Against the Participants.*

No taking was committed by the Washington municipalities which defended themselves in a lawsuit brought by Chemical Bank. Also, no taking was committed by the Washington Court when it judicially determined that the agreement was beyond the statutory authority of the Washington municipalities.

The Takings Clause has not been interpreted to mean that it has been violated by a state court that applies state law to determine that a contractual provision is unenforceable.

The Washington Court did not act in any of the few ways that this Court has held that a judicial decision itself can deny a constitutional right: The Washington Court did not discriminate against an entity or group where fairness called for uniform treatment, *Shelley v. Kraemer*, 334 U.S. 1 (1948), nor did it apply a defamation remedy in a way that violated First Amendment rights.

Petitioners assert (Petit. 17-21) the case of *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155 (1980), as authority for their claim that the Washington Supreme Court's decisions constituted a constitutional taking. In *Webb's*, the taking was caused by application of a state statute that declared:

> All interest accruing from moneys deposited shall be deemed income of the office of the clerk . . . .

449 U.S. at 156. This statute transformed private property into public property without compensation:

> The state statute has the practical effect of apropriating for the county the value of the use of the fund for the period in which it is held in the registry.

449 U.S. at 164.

The Florida Court there had sanctioned the statute and interpreted its meaning, probably correctly. But the taking was imposed by the statute. By contrast, in the case now before this

Court, the complained-of action is court decisions denying a private contract claim by interpreting a contract in light of the state's statutes and common law of contracts.

E. This Case Does Not Involve Federal Questions — It Is a Matter of State Law Only.

The Washington Supreme Court has ruled twice (*Chemical Bank I and II*) on its interpretation of Washington statutory law. Petitioners point out that the Oregon Supreme Court ruled that its municipal participants did have authority under Oregon law (Petit. 14) and that the Idaho Supreme Court ruled that the Idaho municipal participants did not have authority under Idaho constitutional law to enter the Agreement (Petit. 13).[34] In addition, the Wyoming Supreme Court upheld a public utility commission denial of an increase in the rates of a Wyoming private utility participant in WPPSS project No. 5 on the grounds that the project was not "used and useful." *Pacific Power & Light Co. v. The Public Service Commission of Wyoming, et al.*, 677 P.2d 799 (Wyo. Feb. 7, 1984).[35]

These different state court decisions merely reflect that state laws and constitutions are different and therefore different results may occur. The Washington decisions are based on statutory, not constitutional, law; the Oregon decision is founded

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34. Petitioners' statement that the Idaho Participants "successfully sought a decision on the lack of their authority . . ." (Petit. 13) is false. The Idaho case was brought by *ratepayers*, not by participants (*Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. *denied*, 105 S. Ct. 219 (1984)). Similarly, Petitioners' statement that "after the (Idaho) Supreme Court decision, the Washington Superior Court relieved the Idaho participants from any liability" (Petit. 13, n.7) is at least misleading, if not totally false. The Idaho Supreme Court initially entered a Writ of Prohibition on November 3, 1982, before any hearing, merely precluding payment by Idaho cities pending resolution of the Idaho case. The Washington Superior Court entered its summary judgment on August 11, 1983, dismissing Petitioner's claims against the Idaho cities after remand from Chemical Bank I. The actual decision on the merits in the Idaho case was rendered on September 26, 1983, over one month *after* the Washington Supreme Court decision.

35. The Wyoming Supreme Court agreed with the Washington Supreme Court ruling in *Chemical Bank II* and therefore declared as moot the appeal of Lower Valley Power & Light, Inc. and Chemical Bank to reverse the Public Service Commission's denial of a rate increase to Lower Valley as a participant in WNP 4 and 5.

on the fact that Oregon is a home-rule state, and Washington is not; the Idaho decision is based on Idaho's Constitution which differs from both Washington's and Oregon's; and the Wyoming decision is founded upon public utility commission regulation of electrical rates. Application of these different state constitutions, statutes, and case laws does not create a federal question. *See Asson. v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) *cert. denied*. 105 S. Ct. 219 (1984).

III. CONCLUSION

Chemical Bank commenced an action in Washington state courts in an attempt to enforce what they argued was a valid contract claim. They lost.[36] If that event created a federal claim to be litigated in this Court, it would quickly be buried in decisions in which a state court ruled against either party to a contract or where a state or its municipality successfully defended against unenforceable contract claims.

The Petition for Certiorari should be denied.

Respectfully submitted April 5, 1985.

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36. Petitioners then commenced an action against the same defendants in federal court *(Chemical Bank III)* which is progressing through discovery toward a March 1, 1986 trial date. Chemical Bank originally joined 500-600 individuals in this federal case. All of the 100 plus individuals affiliated with these 21 respondents (along with several hundred more) were dismissed from the federal court case on motions to dismiss. Chemical Bank did not choose to sue any of the underwriters which sold WPPSS bonds, notwithstanding that the MDL class plaintiffs did sue them. Chemical Bank may have chosen not to sue the underwriters because the bank itself was an underwriter of over $30 million in WPPSS bonds on WNP 1-3.